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January 26, 2006

Dr. Robert Sawyer, Chairman
California Air Resources Board
1001 J Street
Sacramento, CA

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RE: Comments on Staff's Clarification of the Memorandum of Understanding between the ARB and the Participating Railroads

Dear Dr. Sawyer,

The California Air Pollution Control Officers Association appreciates the effort made by ARB staff to brief the CAPCOA Board on the results of the process undertaken to clarify the intended meaning and interpretation of the MOU between ARB and the Participating Railroads. That process did address some of the questions we and our members raised about the MOU. Unfortunately, our main concerns remain unresolved, and we respectfully urge your Board to address them.

In our previous letter, dated August 31, 2005 to Ms. Catherine Witherspoon, and in testimony presented at the October 27, 2005 Board Hearing, CAPCOA raised three significant concerns with the MOU. These include the need for a full, fair, and open public process, the need for clarification and enhancement of the enforcement provisions of the MOU, and the need for substantial revision to, or elimination of, the MOU's release of obligations clause.

We understand that the first issue is not a topic of the continued Hearing; we want to state, however, that we appreciate staff's commitment to open process for future MOUs and amendments, and we look forward to participating in any public forums ARB provides as the next phase of this MOU is developed.

CAPCOA also appreciates the clarification offered by staff regarding the continued enforcement of prior agreements and authorities. Local air districts need the full scope of authority that was in effect before ARB's MOU was established, and the ability to enforce any pre-existing requirements. We are very concerned, however that the manner in which ARB chose to make these clarifications – namely, through a side letter rather than as part of the body of the agreement – is itself unenforceable. In the event of a future dispute about the meaning of terms, the governing language will be what is in the signed agreement. In addition, there are a number of terms that ARB did not clarify; due to their ambiguity, these terms will substantially hinder enforcement of the provisions of the MOU. We also believe that some of the appeal processes and other enforcement-related structures in the document will make successful enforcement very difficult.

Some of our members have submitted letters to ARB describing the terms of concern, and we refer you to them for further detail.

The enforceability of the MOU is of great importance to CAPCOA. Because of the simple fact that we are geographically closer to the sites of implementation, and because we respond to questions and complaints from the public, air districts are likely to be involved in the implementation and enforcement of the final agreement; we feel strongly that the agreement must provide an adequate platform for that implementation and enforcement to occur. More importantly, the document must be enforceable to ensure that the promised benefits actually occur.

ARB staff has indicated that the MOU is based on the goodwill and mutual understanding between ARB and the Participating Railroads, and that enforcement is not expected to be needed. While we congratulate the parties on achieving this collaborative relationship, we feel compelled to point out that relationships change over time and, more importantly, so do recollections of agreements reached. Historically, local governments have experienced great practical difficulties in their dealings with the railroads. And we have all enjoyed the glow of successful negotiation, only to find ourselves later in bitter disputes over the intended meaning of the words on the page, or the significance of things omitted. Because of this, **CAPCOA urges the Board to direct staff to provide greater clarity and enforceability, and to incorporate all clarifications into the body of the agreement.**

The issue of greatest concern to CAPCOA is still the wording of the "Release of Obligations" clause. We stated in our prior letter that "CAPCOA clearly, completely, and unambiguously opposes the "Release of Obligations" clause of the MOU as stipulated in Section C (11)(c)(i)." We asked that it be either substantially amended or removed.

Our previous letter explained the basis of our concern. At the October hearing, we and many others from state and local government testified to the importance of this issue. Simply put, the concern is that the railroads will use the wording of the release clause to create greater hurdles for state and local government to exercise its *already existing* authority to regulate or mitigate the impacts of rail activities. We believe they will do this by creating the specter of lost emission reductions statewide if a state or local body proposes to act to mitigate impacts on the public it is charged with protecting.

As we stated before, it is already very difficult to require the mitigation of rail impacts; the release clause makes it even more difficult. The clarification letter, even if it were fully enforceable, does not address this fundamental concern. Therefore, **CAPCOA asks again that the Release of Obligations clause in Section C (11)(c)(i) be eliminated; at a minimum, it must be revised to apply only in the jurisdiction that has taken the action that would trigger the release option, not terminate the agreement statewide.**

ARB staff has indicated that the railroads are prepared to sign separate side agreements with any district to clarify the implementation of the MOU in that jurisdiction, including a commitment not to activate the release clause based on actions taken elsewhere. Both staff and the railroads have also stated, however, that a patchwork of programs is too cumbersome (hence the need for a statewide MOU). A series of individual side agreements would seem to create the very patchwork that the statewide MOU purports to avoid. CAPCOA believes that our proposed straightforward change to the language of the release clause would be the simplest and clearest way to achieve the clarification.

CAPCOA also objects to basic construct of the release clause; whether intended or not, it has the unfortunate effect of pitting the needs and benefits of one area against those of another. A statewide program should not provide protections to some groups on the condition that others do not receive benefits, nor solve the problems in one area by preventing others from pursuing solutions in their own areas. This is not good public policy. For these reasons, **CAPCOA asks the Board to resolve not to approve the use of this divisive construct in future agreements or programs.**

Reducing public exposure to diesel particulate exhaust is one the highest priorities and greatest challenges facing ARB and the air districts. It is a very big problem. In order to be successful, we will each need to do everything in our power. CAPCOA and its member districts are hopeful that we can find ways to support each others' efforts in the interest of clean air and public health.

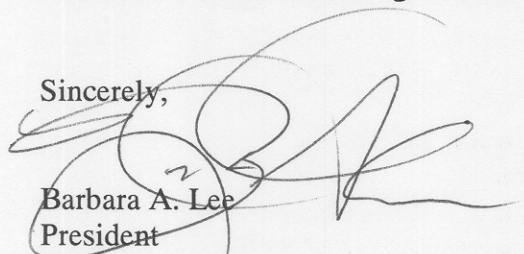
As we have said before, different districts perceive the MOU differently. Some districts anticipate important benefits from its implementation, others expect less, or even none. The cost to us, to other state and local governments, and to the public we are charged with protecting, is the increased difficulty we will face in exercising our own authorities to meet our own responsibilities.

The Release of Obligations clause is by far the most significant objection CAPCOA has to the MOU. Notwithstanding our other concerns, if that clause is eliminated or changed as suggested CAPCOA would support the MOU.

In closing, we want to state that the districts committed much time and thoughtful deliberation in reaching our position on the MOU, and this position represents the overwhelming majority. One of our members, the San Joaquin Valley Air Pollution Control District, has a different position on the MOU. CAPCOA does not represent the San Joaquin Valley in this letter; they will provide their own letter to the ARB articulating their position. CAPCOA strives to represent the common interests of our members, but we always encourage the ARB to respect our members' individual perspectives as well; we urge you to listen carefully to all of the districts who have submitted letters or will appear before you in this matter.

We appreciate the opportunity to offer these comments, and we hope ARB can address our concerns so we can work together to reduce public exposure to rail emissions.

Sincerely,



Barbara A. Lee
President

Cc: Ms. Catherine Witherspoon, ARB Executive Officer

CAPCOA Members